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No. 86-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner challenges the court of appeals' holding that fee awards to it under the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. III) 2412(d)(2)(A), are limited to the actual costs it incurs in employing in-house staff attorneys to litigate on behalf of its members.

1. This case arises from petitioner's representation of a member employee of the Internal Revenue Service in arbitration and judicial proceedings concerning the decision of the Office of Personnel Man-

agement to remove the employee for cause.[1] While sustaining the agency's finding of misconduct by the employee, the arbitrator mitigated the penalty to an 11-month suspension (Pet. App. 17a-32a) and thereafter denied OPM's petition for reconsideration (*id.* at 33a-41a). OPM unsuccessfully petitioned the Federal Circuit for review of the arbitrator's decision (*id.* at 13a-16a).

Petitioner thereafter sought an award of attorney fees under the Back Pay Act, 5 U.S.C. 5596, for time spent representing the employee before the arbitrator, and under EAJA for time spent representing the employee in the court of appeals. The Federal Circuit denied petitioner's request for fees under the Back Pay Act, a denial that petitioner does not challenge here, but it granted in part petitioner's request for fees under EAJA (Pet. App. 2a-3a). Petitioner sought fees for 183.75 hours at an hourly rate of $75, the maximum permissible under EAJA absent a showing of special circumstances (Pet. App. 4a; 28 U.S.C. (& Supp. III) 2412(d)(2)(A)(ii)). The court of appeals refused to make an award at this rate. Applying its prior decision in *Goodrich* v. *Dep't of the Navy*, 733 F.2d 1578 (1984), cert. denied, 469 U.S. 1189 (1985), and the D.C. Circuit's decision in *National Treasury Employees Union* v. *United States Dep't of Treasury*, 656 F.2d 848 (1981), as well as the general practice of the Merit Systems Protection Board,[2] the court held that petitioner's fees should not

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[1] The agency had found that the employee, Ms. Zazenda Smith, had "falsified documents to enhance her performance record as a GS-9 auditor, and had made false verbal statements to her supervisor" (Pet. App. 13a-14a).

[2] *O'Donnell* v. *Dep't of the Interior*, 2 M.S.P.R. 445 (1980); *Wells* v. *Schweiker*, 14 M.S.P.R. 175 (1982); *Powell* v. *Dep't*

incorporate any profit element but rather should be based on its cost of employing the staff attorneys involved (Pet. App. 3a-10a).[3]

The court grounded its holding on the undisputed facts that the prevailing attorneys "were salaried employees of the union, and * * * that the fee, if awarded, would go to the union" (Pet. App. 7a). An award of market rate fees to petitioner, the court ruled (*ibid.*), would thus contravene ethical standards set forth in the ABA's Model Code of Professional Responsibility. As the court explained, Disciplinary Rule (DR) 2-103(D)(4)(a) provides that a lay organization's prepaid legal services plan must be so "organized and operated that no profit is derived by it from the rendition of legal services by lawyers." In addition, the ABA's DR 3-102 and DR 3-101(A) prohibit attorneys from splitting fees with lay organizations and from assisting laymen in the unauthorized practice of law.[4] Finding "[n]othing in the EAJA or its legislative history indicat[ing] that courts should ignore these safeguards," the court concluded that continued adherence to these principles is appropriate to "protect the public from irresponsible and incompetent law practice when awarding attorney fees under the EAJA" (Pet. App. 7a).

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of the Treasury, 19 M.S.P.R. 174 (1984); *Allen* v. *Dep't of the Treasury*, 20 M.S.P.R. 518 (1984).

[3] This cost, the court ruled, was to be based on the attorneys' salaries and the overhead incurred by petitioner in connection with this case (Pet. App. 10a). Petitioner accordingly was awarded a fee of $5,965.12 (*id.* at 12a), rather than the $13,781.25 it would have received under its calculations.

[4] DR 3-101(A) provides that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." DR 3-102 provides in pertinent part that "[a] lawyer or law firm shall not share legal fees with a non-lawyer."

The court emphasized that its ruling is limited to those situations where a union has chosen not to establish a separate legal representation fund that is "fully supportive of the union's litigation activities" (Pet. App. 9a). The court also noted that its ruling does not prohibit market rate awards "directly to the attorneys, [who] could, in turn, reimburse the union for its actual expenses, or as they are allowed to do in any case, make a charitable contribution to any organization they see fit" (*ibid.*). The court found no indication in this case, however, that the fees awarded would go to the attorneys individually rather than to the union. And while the union here had established a separate legal representation account, that account was subsidized in large part by the union's general treasury and hence was not "fully supportive of the union's litigation activities" (*ibid.*). The court thus could "see no reason to ignore the rules of ethics that the legal profession maintains to ensure its integrity" (*ibid.*).

2. Petitioner contends that the decision below is contrary to EAJA and in conflict with the D.C. Circuit's decision in *Jordan* v. *United States Dep't of Justice*, 691 F.2d 514 (1982), and the Ninth Circuit's decision in *Curran* v. *Dep't of the Treasury*, 805 F.2d 1406 (1986). However, application of ethical principles in this case is not precluded by EAJA, which is completely silent on the subject. While the decision below appears inconsistent with the Ninth Circuit's reasoning in *Curran* and with dicta in the D.C. Circuit's decision in *Jordan*, there is not a direct conflict in holdings. In any event, for the reasons set forth below, any inconsistency in reasoning is of limited importance and not likely to recur with any frequency. Review by this Court is therefore not warranted.

a. Petitioner's primary contention (Pet. 7-9) is that an award of fees at other than market rates is inconsistent with the general instruction in EAJA that fee awards are to be "based upon prevailing market rates for the kind and quality of the services furnished" (28 U.S.C. (& Supp. III) 2412(d)(2)(A)). This argument is without merit. We do not dispute, of course, that under the general principles set out in *Blum* v. *Stenson*, 465 U.S. 886 (1984), fees to non-profit organizations are generally based on prevailing market rates. However, nothing in *Blum* or in EAJA is inconsistent with the paramount obligation of the courts to ensure that relevant ethical considerations are observed by attorneys practicing before them.[5] Disallowance of fees otherwise authorized has been repeatedly ordered by courts in a variety of situations where necessary to enforce ethical considerations. See, *e.g.*, *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941); *In re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 533 (3d Cir. 1982); *In re New York, New Haven &*

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[5] Petitioner suggests (Pet. 11-14) that there is actually no ethical problem here at all because, in its view, its organizational arrangements have overcome the fee-splitting and unauthorized-practice-of-law restrictions of the ABA Disciplinary Rules. Petitioner overlooks, however, the requirement of DR 2-103(D)(4)(a) that attorneys may not work for a lay organization that derives a profit from its rendition of legal services. See pages 9-10, *infra*. As the D.C. Circuit has noted (*National Treasury Employees Union*, 656 F.2d at 851), these Rules are "due great deference," not only because they "enshrine[] the collective wisdom of the legal profession on what is acceptable behavior" and "derive * * * considerable force from the power of the bench and bar to discipline errant attorneys," but also because "they afford the public its best assurance of competent and responsible legal service."

Hartford R.R., 567 F.2d 166, 176 (2d Cir.), cert. denied, 434 U.S. 833 (1977). Congress in enacting EAJA surely did not intend that the courts should ignore this well-established practice.

Despite its contention that EAJA's language invariably compels payment of fees at "prevailing market rates," petitioner itself appears to acknowledge the need for *some* exceptions based on ethical considerations. For example, when it created "a separate account into which all fees would be allocated, to be used solely for funding litigation" (Pet. 10-11), petitioner evidently recognized that ethical rules bar the payment of market rate fees if such fees are simply deposited into a union's general treasury. Thus, the question here is not, as petitioner suggests, whether EAJA *ever* permits an award of fees at other than market rates. The question, rather, concerns the scope of the ethical considerations that call for a departure from EAJA's "prevailing market rate" norm.

Petitioner is also incorrect in asserting that the ruling below will have widespread consequences beyond the particular situation involved here, *viz.*, the provision by a labor union of prepaid legal services to its federal employee members. The court expressly disavowed any application of its ruling to legal aid organizations, such as those involved in *Blum*, "where the organization exists solely to provide legal help" (Pet. App. 9a).[6] Indeed, the court of appeals made

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[6] As the D.C. Circuit explained in *Nat'l Treasury Employees Union*, 656 F.2d at 853-854:

> The Code of Professional Responsibility permits a lawyer to divide fees [with or] distribute them to other members of his "law firm or law office" [DR 2-107], and we see no reason why this authorization should not extend

clear that petitioner itself could secure the payment of market rate fees by restructuring its operations. The court left open the possibility that a fully self-supporting litigation fund would pose no ethical problems requiring a fee limitation. And the court also made plain that market rate fees could be awarded directly to the attorneys involved (*ibid.*). In short, the court's ruling applies only where, as here, the litigation fund is supported by the general funds of the non-lawyer organization, so that the organization as a whole would derive a direct benefit from the profits inherent in any award of market-based fees.[7]

b. Petitioner also asserts (Pet. 9-11) that the decision below is in "square conflict" with the D.C. Circuit's decision in *Jordan* and the Ninth Circuit's holding in *Curran*. The supposed conflict with *Jordan*, however, was presented by the petitioner in *Goodrich* v. *Dep't of the Navy*, No. 84-577, seeking review of a prior Federal Circuit decision on which the decision below was based. See Pet. App. 5a-9a (discuss-

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to public as well as private legal practitioners. The same principle leaves a salaried attorney at liberty to surrender his fees to a public interest organization dedicated entirely to litigative activities.

[7] We are not aware of any such organizations likely to be eligible for EAJA awards other than unions of government employees which, like petitioner, provide prepaid legal services. In fact, all of the cases that have considered this issue to date—apart from *Jordan*, which involved another federal employee union—have concerned efforts by the instant petitioner to recover attorney fees. Because of the net worth limitations on those eligible for EAJA fee awards (28 U.S.C. (& Supp. III) 2412(d)(2)(B)), it is unlikely that in-house counsel of for-profit corporations would often have occasion to seek an award of attorney fees under EAJA (see Pet. 12 n.9).

ing *Goodrich*). Certiorari in *Goodrich* was nevertheless denied. 469 U.S. 1189 (1985). In opposing certiorari there, we explained that there was no conflict between *Jordan* and the Federal Circuit's approach. See 84-577 Resp. Br. in Opp. at 12-13 n.4. Our discussion in *Goodrich* is sufficient to dispose of petitioner's similar allegation of a conflict between *Jordan* and the Federal Circuit's decision here.[8]

There is likewise no square conflict in holdings between the decision below and the Ninth Circuit's decision in *Curran*. The decision in *Curran* did not involve EAJA. Rather, the Ninth Circuit held that the Merit Systems Protection Board (MSPB) had erred in awarding fees to the National Treasury Employees Union under the Back Pay Act on the basis of the Union's costs rather than a market rate. In so holding, the Ninth Circuit did disagree with the reasoning employed by the Federal Circuit in *Goodrich* and in the instant case. There is thus a conflict in reasoning between the two courts.

This conflict in reasoning, however, is of little continuing importance, which is one of the factors that led us not to seek certiorari in *Curran*. As the Ninth Circuit itself noted in *Curran*, the Back Pay Act issue was before it, as a regional circuit, solely because "the matter was pending in our circuit on October 1, 1982, the cutoff date for the transfer of MSPB appeals to the Federal Circuit under the Federal Courts Improvement Act" (805 F.2d at 1407, citing 28 U.S.C. 171 note and 5 U.S.C. 7703(b)(1)). Since the Federal Circuit now has exclusive jurisdiction over almost all appeals from MSPB decisions, the conflict created by the decision in *Curran* will

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[8] That discussion is reproduced at App., *infra*.

rarely arise outside the very small universe of cases involving union pre-paid legal services which, like *Curran*, were pending in a regional circuit on October 1, 1982.[9]

c. Equally unpersuasive is petitioner's reliance (Pet. 11-14) on D.C. Bar Comm. on Legal Ethics, Op. 176 (1986). The District of Columbia Bar there concluded that a non-fully-self-supporting litigation fund maintained by a union would not violate the D.C. Bar's Code of Professional Responsibility. While relying heavily on this Opinion, petitioner overlooks the fact that the D.C. Code, as adopted by the District of Columbia Court of Appeals, does not include DR 2-103(D)(4)(a), which was the basis of the Federal Circuit's ruling in *Goodrich* and in this case. As we have noted (page 3, *supra*), DR 2-103(D)(4)(a) provides that a lay organization's prepaid legal services plan must be so "organized and operated that no profit is derived by it from the rendition of legal services by lawyers." In Opinion 176, the D.C. Bar found the omission of this Disciplinary Rule from the D.C. Code to be controlling, stating that "[w]e believe that the [Court of Appeals'] failure to adopt the ABA's DR 2-103(D)(4)(a) is sig-

[9] We note that attorney fees under the Back Pay Act may be ordered in cases other than those brought before the MSPB. For example, if an employee successfully obtains improperly withheld pay or benefits, the employee may be entitled to Back Pay Act attorney fees. However, district court jurisdiction in any such suit would be under the Little Tucker Act, 28 U.S.C. 1346(a)(2). Accordingly, any appeal from such a decision awarding fees would be to the Federal Circuit under 28 U.S.C. 1295(a)(2). See generally *United States* v. *Hohri*, No. 86-510 (June 1, 1987). Similarly, review of EAJA claims in cases brought under the Little Tucker Act would lie exclusively in the Federal Circuit.

nificant. At the least it indicates that, in this jurisdiction, it is not improper, so long as other Code provisions are not contravened, for an organization to 'profit' indirectly from the legal services it recommends to its members" (Op. 176, at 6). Accordingly, Opinion 176 is not contrary to the Federal Circuit's reliance on, and interpretation of, DR 2-103(D)(4)(a) as embodying the appropriate ethical standard for the practice of law before the Federal Circuit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Brief for the Respondent in Opposition at 12 n.14, *Goodrich* v. *Dep't of the Navy*, No. 84-577:

> In *NTEU*, the court expressly refrained from deciding whether the ethical problem presented by payment of market value attorney fee awards to unions would be resolved if the monies were directed to a fund for maintenance of a legal services program. 656 F.2d at 855. Petitioner asserts (Pet. 16) that this question was settled in *Jordan* v. *United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982). *Jordan* arose under the Freedom of Information Act. The district court denied an award of attorney fees for work performed by the legal staff of the Institute for Public Representation at Georgetown University Law Center because the application was not supported by appropriate documentation. The court of appeals reversed and, in passing, mentioned the *NTEU* decision in a footnote. 691 F.2d at 516 n.14. The court there simply stated that it "assume[d]" for purposes of the appeal that, should the Institute share in any attorney fee award beyond recoupment of its own expenses, it would maintain a fund exclusively for litigation, into which its share would be deposited. The court noted that, in *NTEU*, the question whether such a separate fund would resolve the ethical questions was not presented. *Ibid.*
>
> The *Jordan* decision does not make clear the fee relationship between the Institute and the attorneys representing Mr. Jordan or whether pay-

ment would be made to the Institute or directly to the lawyers. In any event, the question of a separate account was not presented in *Jordan*, just as it was not in *NTEU*, and we therefore cannot assume that the court intended to resolve it in so casual a manner in a footnote, since to do so would sanction a possible circumvention of the ethical concerns raised in *NTEU*.

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